



Novitz, T. A. (2020). Multi-level Disputes relating to Freedom of Association and the Right to Strike: Transnational Systems, Actors and Resources. *International Journal of Comparative Labour Law*, 36(4), 471 – 494.

<https://kluwerlawonline.com/JournalArticle/International+Journal+of+Comparative+Labour+Law+and+Industrial+Relations/36.4/IJCL2020024>

Peer reviewed version

[Link to publication record in Explore Bristol Research](#)
PDF-document

This is the author accepted manuscript (AAM). The final published version (version of record) is available online via Wolters Kluwer at <https://kluwerlawonline.com/JournalArticle/International+Journal+of+Comparative+Labour+Law+and+Industrial+Relations/36.4/IJCL2020024>. Please refer to any applicable terms of use of the publisher.

University of Bristol - Explore Bristol Research

General rights

This document is made available in accordance with publisher policies. Please cite only the published version using the reference above. Full terms of use are available: <http://www.bristol.ac.uk/red/research-policy/pure/user-guides/ebr-terms/>

Multi-level Disputes relating to Freedom of Association and the Right to Strike: Transnational Systems, Actors and Resources

Tonia Novitz¹

Abstract:

This article examines disputes regarding the connection between freedom of association and the right to strike, occurring at multiple levels, within international, regional and national legal orders. It focuses on the period from 2007 – 2019, when a challenge was made to norms long-established at the International Labour Organisations (ILO) that was subsequently continued in European and national court proceedings. These events raised the potential for normative fragmentation and conflict between legal systems. This article interrogates the roles played by two key actors in these processes: the International Organization of Employers (IOE) and the International Trade Union Confederation (ITUC). Drawing on sociological insights into collective action offered by Offe and Wiesensthal, transposed to the transnational level, an analysis is offered of the power dynamics that motivated IOE attempts to alter the content and influence of ILO norms, alongside the scope for ITUC resistance, given its resources.

Key words:

Freedom of association, right to strike, transnational, International Labour Organization (ILO), Council of Europe, European Union (EU), fragmentation, systems, communication, power

¹ Professor of Labour Law, University of Bristol (tonia.novitz@bristol.ac.uk). I am very grateful to Michael Ford QC, Guy Mundlak and Jeffrey Vogt for their helpful comments on an earlier version of this paper; and also to participants at the workshop held at Bristol in October 2019. All opinions expressed here, as well as any errors or omissions, are my own.

I. INTRODUCTION

‘Freedom of association’ has been recognised as a national constitutional principle,² but also in international and regional human rights instruments relating to civil and political rights, such as the European Convention on Human Rights 1950 (ECHR) and the International Covenant on Civil and Political Rights 1966 (ICCPR). The concrete protections associated with collective labour law, such as the right to strike, are set out in instruments addressing socio-economic entitlements, notably the European Social Charter 1961 and the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR). In this complex national, regional and international matrix, the International Labour Organization (ILO) has navigated a bridge between these categories of rights, for example linking freedom of association to the right to strike in the jurisprudence of its supervisory bodies, especially the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the tripartite Governing Body Committee on Freedom of Association (CFA). The CFA has repeatedly found that ‘the right to strike is one of the essential means through which workers and their organizations may promote and defend their economic and social interests’.³ Both the CFA and the CEACR regard the right to strike also as ‘an intrinsic corollary to the right to organize protected by Convention No. 87’,⁴ and have continued to pursue normative consistency.⁵

This article considers recent events during which that connection made by the ILO between freedom of association, the right to organise and the right to strike has been challenged, initially by an employers’ group ‘walk out’ at the ILO⁶ and subsequently. This

² See Judy Fudge, *Constitutionalizing Labour Rights in Canada and Europe: Freedom of association, collective bargaining, and strikes*, 68(1) *Current Legal Problems* 267 (2015); and Ruth Dukes, *The Labour Constitution: The enduring idea of labour law* (OUP 2014).

³ ILO CFA *Compilation of Decisions on Freedom of Association* paras 753 (ILO 2018).

⁴ *Ibid.*, para. 754; also CEACR, *General Survey on Freedom of Association* 66 (ILO 1994); and *Report of the CEACR on Application of International Labour Standards* 73 (ILO 2014).

⁵ Bernard Gernigon, Alberto Otero and Horatio Guido, *ILO Principles Concerning the Right to Strike* 59 (ILO 1998).

⁶ Janice Bellace, *The ILO and the Right to Strike*, 153 *Int’l Lab. Rev.* 29 (2014); Claire La Hovary, *Showdown at the ILO? A Historical Perspective on the Employers’ Group’s 2012 Challenge to the Right to Strike*, 42(4) *Industrial Law Journal* 338 (2013).

challenge has been manifested at various times and places, threatening fragmentation of norms.⁷ It is a complex journey to map.

In doing this mapping, this article draws on the idea of ‘transnational’ labour law, which considers how the creation and application of labour standards cross national borders. This entails attention to communications between public international law institutions, such as the ILO, European Union (EU) and Council of Europe, but also to the actors which navigate these systems.⁸ In particular, I investigate the roles played by the International Organization of Employers (IOE) and the International Trade Union Confederation (ITUC).

My suggestion is that a sociological perspective on collective action, transposed to a global level, sheds light on the role played by the IOE in challenging what previously seemed to be a stable linkage between the freedom of association and the right to strike, both at the ILO and beyond. The tension between two logics of collective action may also assist in understanding how the ITUC and its allies understood their options and resources when seeking to respond to this challenge in various settings.

II. THE INTER-SYSTEMIC ROLE OF TRANSNATIONAL REPRESENTATIVES OF EMPLOYERS AND WORKERS

Each international, regional and national legal institution has its own internal normative logic stemming from a distinctive constitutional base and functional objectives.⁹ They may be regarded also as separate systems which are operationally (or normatively) closed, but simultaneously cognitively open to learning.¹⁰ When systems interact, the disruption or

⁷ As discussed briefly by Kerry Rittich, *The ILO: Challenges in times of crisis*, 154(1) Int’l Lab. Rev. 85 (2015). For broader concerns, see *Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law* - Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi (2006), https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf.

⁸ See Adelle Blackett, *Theorizing Emancipatory Transnational Futures of International Labor Law* 113 AJIL Unbound 390 (2019); Adelle Blackett and Anne Trebilcock, *Conceptualizing Transnational Labour Law* ch. 1 (Adelle Blackett and Anne Trebilcock eds, 2015).

⁹ Kalina Arabadjieva, *A Framework for Interpreting the Right to Freedom of Association of Workers and Trade Unions in European Human Rights Law* (Oxford DPhil thesis 2019).

¹⁰ Niklas Luhmann, *Social Systems* (Stanford, 1995 – reprint, originally published 1984); and Gunther Teubner, *Law as an Autopoietic System* (Blackwell 1993). Discussed in Tonia Novitz, *Evolutionary Trajectories for Transnational Labour Law: Trade in Goods to Trade in Services?*, 67 Current Legal Problems 239, 259 (2014).

‘perturbations’ can prompt change,¹¹ but these are filtered through their own internal normative framework, so the outcomes cannot be simply pre-determined.¹² Proponents of reflexive labour law would argue accordingly that institutions like the ILO cannot simply ‘command and control’ other institutions, as this is not how systems inter-relate. What matters are the procedures through which systems communicate.¹³

Notably, Simon Deakin has also observed that such communication has impact through the interaction of ‘agents’.¹⁴ This observation chimes with concern expressed by Harry Arthurs that a focus only on procedures could facilitate and obscure shifts in power, in particular between collective representatives of management and labour.¹⁵ This part begins by introducing the IOE and ITUC as two significant transnational actors that play a key role in disputes relating to freedom of association. They both have the capacity to contest and defend systemic norms, and also may seek to transport norms from one system (or even disputes raised there) into another. This part then goes on to consider how their global inter-systemic campaigns might be understood in sociological terms, with reference to the ‘two logics of collective action’ identified by Claude Offe and Helmut Wiesenthal.¹⁶

A. The IOE and ITUC

The IOE and the ITUC are embedded in the ILO’s tripartite structure, even though they have, to different degrees, further influence in a range of international, regional and national fora.¹⁷ The IOE acts as the secretariat for the employers’ group at the ILO, but is institutionally

¹¹ Simon Deakin, *Legal Evolution: Integrating Economic and Systemic Approaches*, 7(3) *Review of Law and Economics* 659, 677 (2011); see also Simon Deakin, *Evolution for our Time: A Theory of Legal Memetics*, 55 *Current Legal Problems* 1 (2003).

¹² Niklas Luhmann, *Operational Closure and Structural Coupling: The differentiation of the legal system*, 13 *Cardozo Law Review* 1419 (1992); and Teubner n.10, 35.

¹³ Discussed in Ralf Rogowski, *Reflexive Labour Law in the World Society* (Edward Elgar 2013), chs 1-3.

¹⁴ Simon Deakin, *Legal Evolution: Integrating Economic and Systemic Approaches*, 7(3) *Review of Law and Economics* 659, 677 (2011), 677.

¹⁵ Harry Arthurs, *Corporate Self-Regulation: Political Economy, State Regulation and Reflexive Labour Law* ch. 2 (Brian Bercusson, Cynthia Estlund, eds, 2008).

¹⁶ Claus Offe and Helmut Wiesenthal, *Two Logics of Collective Action: Theoretical notes on social class and organizational form*, 1(1) *Political Power and Social Theory* 67 (1980).

¹⁷ Claire La Hovary, *A Challenging Ménage à Trois? Tripartism in the International Labour Organization*, 12(1) *International Organizations Law Review* 204, (2015).

separate from the Bureau for Employers' Activities established within the ILO (ACTEMP).¹⁸ The ITUC provides parallel support for the ILO workers' group, distinct from the Bureau for Workers' Activities (ACTRAV).¹⁹

The particular history of each organisation seems significant in demarcating its operational concerns. The IOE was founded in 1920 and given its present name in 1938. Known for specialising in 'social matters' at the ILO, the IOE has long been one of 'two organisations representing the undertakings of the market economy countries'.²⁰ The other is the International Chamber of Commerce (ICC), which is known to specialise in 'economic matters'.²¹ In 1971, they reached agreement on their respective roles, but a study by Marieke Louis in 2016 found that they were in fact in 'competition', such that the IOE was 'side-lined' in various international economic settings.²² Her interviews with IOE representatives exposed their criticism of both the ICC and the World Economic Forum (WEF),²³ indicating that representatives of business interests may not constitute 'a collaborative and homogenous group'.²⁴

There are indications that the IOE is seeking to expand its representative role. The IOE has broadened its membership base, with a change of rules in 2019, to include also corporate organisations, previously represented only in the ICC.²⁵ In 2020, the Vice-President of the IOE advocated an increased institutional role for 'the global social partner organisations' in other parts of the UN (beyond the ILO) and regional organisations.²⁶ Moreover, in its current promotional literature, the IOE is described as 'the sole

¹⁸ 'ILO Bureau for Employers' Activities (ACTEMP)' (April 29, 2020), <https://www.ilo.org/actemp/lang--en/index.htm>.

¹⁹ 'ILO Bureau for Workers' Activities (ACTRAV)' (April 29, 2020), <https://www.ilo.org/actrav/lang--en/index.htm>.

²⁰ Jean-Jacques Oechslin, *Employers' Organisations: Current Trends and Social Responsibilities*, 121 Int'l Lab. Rev. 503, 515-516 (1982).

²¹ Ibid.

²² Marieke Louis, *The ILO, Social Partners and the G20: New prospects for social dialogue at the global level?*, 16(3) Global Social Policy 235, 240 - 244 (2016).

²³ Ibid.

²⁴ Ibid., 244.

²⁵ Ibid., 241. See IOE Statutes (2019), Article 2, <http://www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=145587&token=c4497389ebbad1597b105c949f69f11cb2a01a35&L=0>.

²⁶ Renate Hornung-Draus, *Cross-border Social Dialogue from the Perspective of Employers*, European Labour Law Journal 1, 12 (2020).

representative of business’ at the ILO, but also as being recognised ‘across the UN, G20 and other emerging forums... for its unique expertise, advocacy and influence’.²⁷

The ITUC was created only in 2006, with the merger of two previously divided trade union confederations,²⁸ the International Confederation of Free Trade Unions (ICFTU) and the World Confederation of Labour (WCL).²⁹ At the time, the inaugural ITUC Secretary General, Guy Ryder, announced that: ‘Together, united, strong, the ITUC will play its part in building social justice, freedom, equality and peace ...’³⁰ This message of unification has been significant for ITUC relationships with regional and global trade union confederations.

The European Trade Union Confederation (ETUC) was created in 1973, leading to a decision by the ICFTU (one of the co-founders of the ITUC) to dis-establish its own European branch and instead work constructively with this new entity.³¹ The ETUC subsequently gained significant access to European-level social dialogue with European management alongside EU institutional funding. Rebecca Gumbrell-McCormick sees the ETUC as a forerunner of the unity accomplished in formation of the ITUC, insofar as the ETUC had admitted both ICFTU and WCL affiliates as its members.³² Since 2006, the ETUC has worked collaboratively with the ITUC. Their headquarters are in the same building and they organise various activities and campaigns together.

The ‘International Trade Secretariats’ established before the first World War changed their titles in 2002 to ‘Global Union Federations’ (GUFs) to reflect their engagement in

²⁷ ‘The International Organisation of Employers – At a glance’, 3 (April 29, 2020), <https://www.ioe-emp.org/index.php?eID=dumpFile&t=f&f=135149&token=7a2ac853c541a0a25c20bc09678ff3cb21bf90c3>.

²⁸ See Rebecca Gumbrell-McCormick, *The International Labour Movement: Structure and Dynamics* (Peter Fairbrother, Christian Lévesque, Marc-Antonin Hennebert, eds., 2013); Rebecca Gumbrell-McCormick, *The International Trade Union Confederation: From Two (or More?) Identities to One*, 51(2) BJIR 240 (2013b).

²⁹ There was a decline in the funding and influence of more militant World Federation of Trade Unions (WFTU) after the demise of the Soviet Union but the WFTU continues to represent the communist-led trade union movement, having influence still in developing states. See ‘History’ (April 29, 2020), <http://www.wftucentral.org/history/>. Also, Gumbrell-McCormick (2013b) n.28 above, 247 and 253; and Louis n.22 above, 240.

³⁰ As reported in Rudolf Traub-Merz and Jürgen Eckl, *International Trade Union Movement: Mergers and Contradictions* Friedrich Ebert Stiftung briefing papers No. 1/2007, Part 1 (2007).

³¹ Ibid., Part 4.

³² Elizabeth Cotton and Rebecca Gumbrell-McCormick, *Global Unions as Imperfect Multilateral Organizations: An international relations perspective*, 33(4) Economic and Industrial Democracy 707, 708 and 711-712 (2012).

global sectoral union organising and bargaining.³³ They have allied themselves to the ITUC.³⁴ In addition, the ITUC works in tandem with the Trade Union Advisory Committee (TUAC) in the OECD, again sharing many affiliates.³⁵ The ITUC has also sought a highly inclusive representative role in relation to precarious and what have been described as ‘non-standard’ workers.³⁶

Despite tensions between economic and social legal frameworks,³⁷ the ITUC seems to have had access to representation in many global forums, with the cooperation of its wider allies.³⁸ That success in unification of various facets of the trade union movement may also help to explain the unprecedented election of a highly successful global trade union official, Guy Ryder, to the position of ILO Director General in 2012, being a previous Secretary General of both the ICFTU (from 2002-2006) and the ITUC (from 2006-2010).³⁹

B. A sociological analysis of collective action applied transnationally

Louis mentioned very briefly, in her critique of IOE activities and influences, the potential relevance of a sociological analysis offered by two German commentators, Claus Offe and Helmut Wiesensthal.⁴⁰ Their analysis was aimed at the operation of large and confederal employers’ and workers’ associations in a domestic setting,⁴¹ but may offer a useful frame for examination of the power relations which shape the activities of even larger transnational representatives of management and labour.

³³ Traud-Merz and Eckl n.30 above, Part 2.

³⁴ See Michele Ford and Michael Gillan, *The Global Union Federations in International Industrial Relations: A critical review*, 57(3) Journal of Industrial Relations 456 (2015).

³⁵ ‘About TUAC’ (April 29, 2020), <https://members.tuac.org/en/public/tuac/index.phtml>; and ‘About ITUC’ (April 29, 2020), <https://www.ituc-csi.org/about-us>.

³⁶ La Hovary (2015) n.17, 223. See more recently, ‘ITUC Policy Brief Organising and Collective Bargaining in Non-Standard Forms of Work’ (April 29, 2020), https://www.ituc-csi.org/IMG/pdf/organising_and_collective_bargaining_and_non-standard_forms_of_work_en.pdf.

³⁷ See Eric Tucker, *Labour's Many Constitutions (and Capital's Too)*, 33 Comparative Labor Law and Policy Journal 355 (2012).

³⁸ Louis n.22 above, 240.

³⁹ ‘Biography of Guy Ryder, 10th ILO Director-General’ (April 29, 2020), https://www.ilo.org/global/about-the-ilo/how-the-ilo-works/ilo-director-general/WCMS_205241/lang--en/index.htm.

⁴⁰ Louis n.22, 236.

⁴¹ Examined for e.g. in Michael Ford and Tonia Novitz, *Error! Main Document Only. There is Power in a Union? Revisiting Trade Union Functions in 2019* ch. 14, 263 - 264 (Alan Bogg, Jacob Rowbottom and Alison Young, eds, 2020).

Offe and Wiesenenthal considered how substantive inequality was institutionalized by ‘the liberal equation’, namely insistence on the equivalence of interests of capital and labour as if they were symmetrical and capable of being represented in the same ways.⁴² On this reading, the IOE and ITUC may both be interest groups treated with formal parity within the ILO, but may possess different sources of institutional power.

Offe and Wiesenenthal observed that a trade union faces a considerable challenge in seeking to organise a heterogeneous workforce.⁴³ They identified a trade-off for trade unions between size and power, recognised previously by Olson in relation to the free-rider problem.⁴⁴ For Offe and Wiesenenthal the difficulty is that, while trade unions may seek to increase their membership size in order to counteract an employer’s superior bargaining power, as they do so, they become less equipped to represent their diverse membership. Moreover, unions’ success ‘depends upon their sanctioning potential’, namely the ‘willingness to act’ on the part of members. If a union becomes too large and thereby bureaucratized, it no longer has that source of influence.⁴⁵

This is an inevitable problem for any large confederation of trade unions, whether national, regional (like the ETUC) or globally operating on a sectoral level (like the GUFs). It poses enormous difficulties for the very largest international trade union confederation, the ITUC, that allies these entities and hundreds of affiliates.⁴⁶ Being large seems however an increasing imperative in a globally integrated trading system.⁴⁷ Arguably, the best that the ITUC can hope for is to keep that capacity or willingness to act alive in the affiliates of its constituent national-level members. Arguably, this is precisely what the IOE challenge to the right to strike has sought to threaten.

By way of contrast, according to Offe and Wiesenenthal, employers being ‘the powerful’ will be ‘fewer in number, ... less likely to be divided among themselves, have a clearer view of what they want to defend, and have larger resources for organized action’.⁴⁸ This is a view which has subsequently been applied to transnational employer interests,

⁴² Offe and Wiesenenthal n.16 above, 68 - 71.

⁴³ Ibid., 75.

⁴⁴ Mancur Olson Jr. *The Logic of Collective Action—Public Goods and the Theory of Groups* (Schocken 1968).

⁴⁵ Offe and Wiesenenthal n.16 above, 80 – 81.

⁴⁶ In November 2019, the ITUC had over 200 million worker members in 332 affiliated organisations in 163 countries and territories. See ‘List of ITUC Affiliates’ (April 29, 2020), https://www.ituc-csi.org/IMG/pdf/list_of_affiliates_nov_2019.pdf.

⁴⁷ Rebecca Gumbrell-McCormick (2013b), n.28, 256.

⁴⁸ Offe and Wiesenenthal n.16 above, 78, 83 and 85.

which are not ‘unitary’, but can achieve ‘a unity of purpose and direction’.⁴⁹ Offe and Wiesenenthal also assume that the interests as employers (as manifestations of business) lie in the status quo, which protects their privilege.⁵⁰ As we shall see, these claims do not easily map onto the circumstances of the IOE, which illustrates the capacity for representation of business to be divided on the world stage,⁵¹ and also that employers may have an interest in changing the status quo (or at least that in the ILO).

Offe and Wiesenenthal, in observing the standard imbalance of power between employer and worker associations, further identified five stages through which unions move towards reliance on ‘established and recognized channels of political action’.⁵² While these two commentators were concerned with the risks of such engagement at the national level, we might extrapolate from their analysis dangers also for the ITUC.

Stage one arises when a small sized union is formed around a particular ‘collective identity’ and ‘willingness to act’.⁵³ *Stage two* takes place when the organisation is capable of gaining concessions through ‘its recognized potential of power’, not just because of a strike, but ‘in order to avoid a strike’.⁵⁴ *Stage three* occurs as the organisation grows in size but also becomes more bureaucratic, limiting its ability to mobilise members to take collective action. The union then becomes more dependent on ‘external guarantees’ offered by the state (and employers) that it will be treated with respect:

It will try to become, with the help of its external supporters, incorporated into the formal decision-making process on economic and other policies. It will try to have as many as possible of its bargaining positions, which it had held formerly only because of the ‘willingness to act’ of the members, institutionalized and sanctioned by legal statutes.⁵⁵

This is also an observation that chimes with a power resource approach, as posited by Walter Korpi and others, such that where corporatist governance prevails, the incidence of strikes

⁴⁹ Bastiaan van Apeldoorn, ‘Transnational Class Agency and European Governance: The Case of the European Round Table of Industrialists’ 5(2) *New Political Economy* 157, 159 (2000).

⁵⁰ *Ibid.*, 91.

⁵¹ Louis, n.22, 240.

⁵² Offe and Wiesenenthal n.16 above, 104.

⁵³ *Ibid.*, 106.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, 107.

will decline, because there has been a shift from structural power in the labour market to reliance on political resources.⁵⁶

Offe and Wiesenthal noted that the trade-off for a trade union in exchange for inclusion in the political processes would be acceptance of those processes. They described this as ‘a perfectly rational strategy of transformation, which...’ may work well when ‘social democratic parties are strong political forces’ that can secure such guarantees.⁵⁷ One can also arguably see parallels here with the ‘embedded liberalism’ resisting commodification of labour, which the ILO was designed to craft,⁵⁸ and the attraction of tripartite governance for workers’ organisations globally.

The problem comes in *stage four* when the trade union ‘no longer has any capacity to resist attempts to withdraw external support and the externally provided legal and institutional status’.⁵⁹ Then the external guarantees will become open to threat. Where the structurally powerful position of employers remains intact, there will be a reversal of these political protections ‘as soon as political and/or economic conditions are favorable enough to attempt an attack’.⁶⁰ Arguably, the employers’ group walk out at the ILO might be characterised in this way as an exercise of power which, contextually, the ITUC can do little to resist.

The *fifth stage* identified by Offe and Wiesenthal is a ‘return to a type of collective action in which the members’ “willingness to act” is of predominant importance’. But *stage five* will be different from *stage one*, insofar as it will tend to ‘focus on a much broader range of political, legal, and institutional arrangements, which have played such an important and

⁵⁶ See Walter Korpi, *Power Resources Approach vs. Action and Conflict: On Causal and Intentional Explanations in the Study of Power* 3(2) Sociological Theory, 31 (1985); Kerstin Enflo, Tobias Karlsson, and Jakob Molinder, *The Power Resource Theory Revisited: What Explains the Decline in Industrial Conflicts in Sweden?*. No. 13130. CEPR Discussion Papers (2018); and Stefan Schmalz, Carmen Ludwig, Edward Webster, *The Power Resources Approach: Developments and challenges* 9 Global Labour Journal, 113, 116 - 117 (2018).

⁵⁷ Offe and Wiesenthal, n.16 above, 107.

⁵⁸ See Karl Polanyi, *The Great Transformation: The Political and Economic Origins of Our Time* (1944, 2nd ed. Beacon Press 2001), 27- 28 and 75-79; Gareth Dale, *In Search of Karl Polanyi’s International Relations Theory*, 42 Review of International Studies 401, 419 – 422 (2016); also John Ruggie, *International Regimes, Transactions and Change: Embedded liberalism in the post-war economic order* 36(2) International Organization 385 (1982). Discussed in Tonia Novitz, *Past and Future Work at the International Labour Organization: Labour as a Fictitious Commodity, Countermovement and Sustainability* 17 International Organizations Law Review 10 (2020).

⁵⁹ Offe and Wiesenthal n.16 above, 108.

⁶⁰ Ibid.

deceptive role in the prior stages’.⁶¹ Offe and Wiesenenthal therefore saw political engagement to secure ‘external guarantees’ as ‘precarious’, ‘unstable’ and potentially ‘transitory’, threatening the survival of the union.⁶² This account invites us to consider how the ITUC is facing (and meeting) a *fifth stage* challenge. Offe and Wiesenenthal consider that this can only be successfully done by a return to engagement with collective action, which is difficult to achieve, but to which the ITUC has sought to have some recourse. There might also be scope to utilise other sources of influence, such as mobilization through representations in other supervisory systems.⁶³ Indeed, a contemporary power resources approach suggests that the ITUC can deploy institutional resources involving communications and coordination among its allies in litigation, and seek ‘societal power’ drawing on the messages coming from human rights and constitutional systems.⁶⁴ There also may be other potential strategies available.

III. THE INTERPLAY OF EVENTS AND ACTORS BETWEEN 2007 – 2019

This part of the article traces a series of events, all of which concern the relationship between freedom of association and the right to strike, which took place between 2007 and 2019. In this twelve-year period, notable developments emerged relating to this controversy within the EU, the Council of Europe and the ILO. These, in turn have also had potential implications in national level litigation. They are navigated here by following the interplay between these systems, for it emerges that they are not insulated from each other. Key players in one site would seem to leverage disputes and transpose them to others. Indeed, the transnational institutional nature of both the IOE and ITUC enables them to seek to coordinate their engagement with jurisprudential developments across systems in a strategic manner. Their relative successes and the reasons for these are interrogated here with reference to the conceptual model offered by Offe and Wiesenenthal.

A. The 2007 *Viking* and *Laval* litigation in the EU

⁶¹ Ibid.

⁶² Ibid., 109.

⁶³ See for discussion of the literature on mobilization, Claire Kilpatrick, *Taking the Measure of Changing Labour Mobilization at the International Labour Organisation in the wake of the EU Sovereign Debt Crisis*, 68(3) International & Comparative Law Quarterly 665, 691-692 and 695 (2019).

⁶⁴ Schmalz et al, n.56, 118 – 124.

Two EU judgments, *Viking*⁶⁵ and *Laval*,⁶⁶ became notorious on the subject of freedom of association and the right to strike insofar as the Court of Justice deferred to ILO norms, but departed from their commonly understood implications. Previously, the limited legislative competence of the EU meant that little had been said in concrete social policy terms on freedom of association or the right to strike as entitlements of EU citizens.⁶⁷ Instead, there had been declaratory recognition in Points 11 – 13 of the Community Charter of the Fundamental Social Rights of Workers (CCFSRW), while the right to strike received recognition in Article 28 of the EU Charter of Fundamental Rights (EUCFR) (although this was notionally separate to the guarantee of freedom of association in Article 12).

Both the *Viking* and *Laval* judgments made reference to the ‘various instruments which the Member States have signed or cooperated in, such as the European Social Charter... and Convention No 87 ...’ going on to refer also to the CCFSRW and the EUCFR.⁶⁸ There was then, in systemic terms, arguably deference by the Court of Justice to ILO jurisprudence stating that Convention No. 87 provides a basis for a right to strike. Yet, there was also a clash of systems insofar as the Court prioritized the employer’s entitlements to free movement - of establishment (in *Viking*) and of services (in *Laval*).⁶⁹ In both cases it was found that trade unions could be held financially liable for taking such action, due to their role in regulating industrial relations.⁷⁰ These judgments have been aptly described as adopting the perspective of an EU internal market lawyer over that of an ‘international labour lawyer’.⁷¹

Transnational collective representation of employers and workers became visible in this litigation and its aftermath. In the *Viking* case, the role of a GUF, the ITF, attracted attention. Notably, the ITF describes itself as allied to ITUC (since its creation in 2006, as

⁶⁵ Case C-438/05 *International Transport Workers’ Federation (ITF) and Finnish Seamen’s Union (FSU) v Viking Line* [2007] ECR I-10779 (*‘Viking’*).

⁶⁶ Case C-341/05 *Laval un Partneri v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767 (*‘Laval’*).

⁶⁷ See Article 153(5) of the Treaty on the Functioning of the European Union (TFEU), a longstanding exclusion dating back to Article 2(6) of the ‘Agreement on Social Policy’ appended to the Maastricht Treaty on European Union.

⁶⁸ *Viking* at para. 43; *Laval* at para. 90.

⁶⁹ Albeit in different ways, see *Viking*, para. 75; *Laval*, para. 107 (and para. 103).

⁷⁰ *Viking*, para. 65; *Laval*, para 98. Discussed in Anne Davies, *One Step Forward, Two Steps Back? The Viking and Laval Cases in the ECJ*, 37(2) *Industrial Law Journal* 126 (2008).

⁷¹ Alan Bogg, *Viking and Laval: The International Labour Law Perspective* (Mark Freedland and Jeremias Prassl, eds, 2014), 41.

discussed previously).⁷² It was the ETUC (which as noted above also has its own close strategic relationship with the ITUC), that following the outcome in both *Viking* and *Laval*, actively campaigned for constitutional change in the EU.⁷³ The ETUC was consistently opposed by what was the Union des Industries de la Communauté européenne (UNICE), since 2007 renamed ‘BusinessEurope’.⁷⁴ BusinessEurope currently consists of 40 representatives currently from 35 countries, with a membership overlaps with that of the IOE.⁷⁵ The intensity of engagement by the IOE and the ITUC on this issue was yet to come.

B. The Council of Europe case law 2008 – 2009

While the Court of Justice recognised but restricted exercise of the right to strike in the EU, the European Court of Human Rights (ECtHR) in the Council of Europe took a different tack. The Council of Europe’s two leading human rights instruments had seemed starkly divided, to the extent that Article 11 of the ECHR guaranteed freedom of association, including the right to form and join trade unions for the protection of one’s interests, while the European Social Charter (ESC) set out in Articles 5 and 6 obligations to protect collective bargaining and a right to strike.⁷⁶ The ECtHR had previously used this division to defend its reticence to link collective bargaining or the right to strike to freedom of association.⁷⁷

The *Viking* judgment was, at least in part, premised on the view of the ECtHR that ‘collective action’ was merely one of the ways that a trade union could protect its interests under Article 11 of the ECHR, but was not essential.⁷⁸ Two judgments delivered by the

⁷² ‘About Us’ (April 29, 2020), <https://www.itfseafarers.org/en/about-us..>

⁷³ See <https://www.etuc.org/en/pressrelease/etuc-presents-its-position-laval-and-viking-cases-hearing-european-parliament>.

⁷⁴ For an account of the history of BusinessEurope, see <https://www.busesseurope.eu/history-organisation>. See also ‘Report on joint work of the European social partners on the ECJ rulings in the Viking, Laval, Rüffert and Luxembourg cases - following the invitation from the Employment and Social Affairs Council and the European Commission in November 2008’ (April 29, 2020) available at: <https://www.busesseurope.eu/publications/report-joint-work-european-social-partners-ecj-rulings-viking-laval-ruffert-and>.

⁷⁵ Although their lists do not map neatly onto each other. Cf. <https://www.busesseurope.eu/members> with <https://www.ioe-emp.org/en/members-regions/>.

⁷⁶ Tonia Novitz, *International and European Protection of the Right to Strike* (OUP 2003), chs 6 and 9.

⁷⁷ See for a classic statement of this proposition, *National Union of Belgian Police v Belgium* 1 EHRR 578 (1979), para. 38.

⁷⁸ *Viking*, para. 86, citing inter alia the *Belgian Police* n.77 above.

ECtHR placed that proposition in doubt. First, a right to collective bargaining was considered by a Grand Chamber of the ECtHR in *Demir & Baykara v Turkey* to have ‘become one of the essential elements’ of the Article 11 guarantee of freedom of association.⁷⁹ That Turkey had not ratified and was not bound by Articles 5 and 6 of the ESC was deemed irrelevant; its ratifications of ILO Conventions Nos 98 and 151 were given more attention. Second, in *Enerji Yapi-Yol Sen v Turkey*,⁸⁰ in a manner explicitly consistent with ILO CFA and CEACR recommendations, the ECtHR made the link between freedom of association and industrial action under Article 11. The Court found that exercise of the right to strike should not be restricted other than in narrowly defined circumstances which must be provided for by law, have a legitimate aim and be necessary in a democratic society. In subsequent cases, the ECtHR intervened to protect the interests of strikers, on the basis that their punitive treatment constituted a violation of freedom of association.⁸¹

This series of judgments from 2008 – 2009 is significant, in that the ILO appears to have effectively communicated norms to the Council of Europe ECHR system, which were applied systematically, leading to a correction which reduced fragmentation. This emergent process has been identified by Virginia Mantouvalou as an ‘integrated’ approach to human rights protection.⁸² This ECtHR jurisprudence also arguably placed pressure on the EU market system, fuelling ETUC claims for constitutional and regulatory reform.⁸³ This move towards consistency was certainly heralded with considerable approval from the workers’ side and their advocates, such as Keith Ewing and John Hendy (leading exponents of workers’ human rights within the UK Institute of Employment Rights).⁸⁴

⁷⁹ Appn 34503/97 *Demir and Baykara v Turkey* Appn 34503/9, 12 November 2008., para. 154.

⁸⁰ Appn 68959/01 *Enerji Yapi-Yol Sen v Turkey*, 21 April 2009; following Appns 74611/01, 26876/02 et 27628/0, *Affaire Dilek et Autres v Turquie*, Judgment of 17 July 2007.

⁸¹ Appn 67336/01 *Danilenkov v Russia*, 30 July 2009, para. 123 and Appn 22943/04 *Saime Özcan v Turkey*, 15 September 2009; and Appn 30946/04 *Kaya and Seyhan v Turkey*, 15 September 2009. Although not in all cases, such as Appn 4241/03 *Trofimchuk v Ukraine* Appn 4241/03, 28 January 2011.

⁸² Virginia Mantouvalou, ‘Labour Rights in the European Convention on Human Rights: An Intellectual Justification for an Integrated Approach to Interpretation’ 13 *Human Rights Law Review* 529 (2013).

⁸³ Filip Dorssemont, *The Right to Take Collective Action: The Prospects of the Accession to the European Convention on Human Rights: How the European Court on Human Rights Gave Us Enerji to Cope with Laval and Viking*’ in (Marie-Ange Moreau (ed.), 2011).

⁸⁴ Keith D. Ewing and John Hendy, *The Dramatic Implications of Demir and Baykara*, 39 *Industrial Law Journal* 2 (2010).

C. Reaction in the ILO to the EU and to the Council of Europe

The ILO CEACR responded critically to Court of Justice treatment of the right to strike in the EU. That reaction seems to have been one of a number of factors which, together with the influence which ILO treatment of collective bargaining and the right to strike now seemed to wield in the Council of Europe, led to the dramatic walkout staged by the employers' group in 2012. It was at this stage that the significance of the role played by the IOE became visible.

1. Responding to EU developments

ILO supervisory jurisprudence developed by the CFA and CEACR has stated that the right to strike is not unlimited, but that only certain kinds of limitation are permissible.⁸⁵ The right to strike may be restricted in respect of: 'public servants exercising authority in the name of the state'; in essential services 'the interruption of which would endanger the life, personal safety or health of the whole or part of the population'; and in the event of 'an acute national emergency and for a limited period of time'.⁸⁶ Free movement of establishment and services by employers within a European market system was not regarded as sufficient reason to prevent access to industrial action. 'By linking restrictions on strike action to interference with trade and commerce, a broad range of legitimate strike action could be impeded.'⁸⁷ Accordingly, in the British Airlines Pilots Association (BALPA) case,⁸⁸ the CEACR expressed 'serious concern' regarding 'the omnipresent threat of an action for damages that could bankrupt the union, possible now in the light of the *Viking* and *Laval* judgements'.⁸⁹ Also, the CEACR 2012 General Survey 'Giving Globalisation a Human Face' again asserted the relationship between ILO Conventions Nos 87 and 98 and the right to strike.⁹⁰

⁸⁵ Jeffrey Vogt et al, *The Right to Strike in International Law* (Hart 2020), 44.

⁸⁶ ILO *Digest of Decisions of the CFA*, 5th ed. (2006), para. 541; now ILO *Compilation of Decisions of the CFA* 6th ed (2018), para. 779 and 824.

⁸⁷ ILO *Digest of Decisions of the CFA*, 5th ed. (2006), para. 592.

⁸⁸ See Katherine Apps, *Damages Claims Against Trade Unions After Viking and Laval*, 34 *European Law Review* 141 (2009).

⁸⁹ Committee of Experts on the Application of Conventions and Recommendations, *Report of the Committee of Experts on the Application of Conventions and Recommendations* (Geneva, International Labour Office, 2010) 208–9.

⁹⁰ Discussed by Keith D. Ewing, *Myth and Reality of the Right to Strike as a 'Fundamental Labour Right'* 29(2) *The International Journal of Comparative Labour Law and Industrial Relations* 145, 148.

These findings can be regarded as a simple defence by the CEACR of the normative coherence of the ILO's supervisory system against a significant threat from an external market-based system. As such, they did not prompt any action by the ITUC. Rather, it was the IOE, contrary to Offe and Wiesenthal's assumptions, which was seeking to disrupt the status quo.⁹¹ The CEACR had already been criticised by the employers' group in the ILO Conference Committee on the Application of Standards (the CAS) on the basis that it was interpreting Conventions Nos 87 and 98, neither of which expressly mentioned the right to strike, and had in that way exceeded its constitutional powers.⁹² Such accusations became more heated as the response to EU case law by the CEACR was articulated. Notably, the employers' group was led by Chris Syder, a representation of the Confederation of British Industry (CBI) from the UK, where the *Viking* case had first been heard and the BALPA case arose. What followed was a rebellion led by the IOE culminating in a walkout by the employers' group from the CAS, aimed at preventing consideration of supervisory findings made by the CEACR on the right to strike.⁹³

2. *Other factors?*

The employers' rebellion can also be attributed to other factors. One such factor may have been that the socialist threat of revolution was no longer likely or viable. While the IOE had advocated exercise of right to strike as a facet of freedom of association in communist regimes, such as Poland, IOE enthusiasm had waned at the end of the Cold War.⁹⁴ From 1990 onwards, the employers' group had requested repeatedly that 'dispute settlement' be placed on the ILO International Labour Conference agenda, their hope seeming to be that the new balance of power would work in the employers' favour so as to restrict access to industrial action. Aware of the potential for dilution of the right to strike, the workers' group resisted that proposal.⁹⁵ Arguably, this imbalance of bargaining power had been exacerbated by the

⁹¹ See n.50 above.

⁹² See, for example, *Record of Proceedings* (Geneva: ILO, 2009), ILC, 98th Session, Ethiopia, vol. 16, Part II(Rev.)/37; and Panama, vol. 16, Part II(Rev.)/56.

⁹³ Ibid. See also Bellace and La Hovary, n.6 above.

⁹⁴ See Alfred Wisskirchen, *The Standard-setting and Monitoring activity of the ILO: Legal Questions and Practical Experience* 144 Int. Lab Rev. 253 (2005).

⁹⁵ See Novitz n.76 at 120 – 123.

recent global financial crisis and the decline of trade union protections and access to the right to strike in times of austerity; Europe being no exception.⁹⁶

Recent ECHR jurisprudence may also have added fuel. At the time of the walkout, the employers' group expressed concern that CEACR reports were being referred to in other supervisory proceedings, and arguably guiding State conduct.⁹⁷ In other words, their findings 'were being viewed by the outside world as a form of soft law labour standards jurisprudence'.⁹⁸ As Henner Gött has observed:

The employers did not call the ECtHR by name. However, it can hardly be overlooked that the Court's reversed stance on the right to strike was the proverbial elephant in the room, as it opened an avenue for workers to bring other contentious aspects of the right to strike before the ECtHR.⁹⁹

A further factor may have been the appointment of Guy Ryder to ILO Director-General in May 2012. Although he did not take office until October 2012, the IOE may have wanted to be seen to resist the ILO becoming overly deferential to trade union interests. The recent unification of a divided movement under the ITUC, and under Ryder's leadership, could certainly have seemed threatening. Moreover, if the IOE was competing with other business representatives for recognition on the international stage,¹⁰⁰ this demonstration of its power may have been attractive. In this way, the employers' action chimes with the fourth of Offe and Wiesenenthal's stages of political engagement, namely the withdrawal of 'external guarantees' prompted by employers when the surrounding circumstances look fortuitous.¹⁰¹

By way of contrast, the ITUC, having in Offe and Wiesenenthal's terms conceded to the legitimacy of ILO political processes, would not take such retaliatory action in response. A walkout might be a political possibility for the employers' group (despite its irony while protesting against a right to strike); but this was not an option for the workers' group which was dependent on recognition of the legitimacy of ILO processes (and the external guarantees

⁹⁶ Aristeia Koukiadaki, Isabel Tavora, Isabel and Miguel Martinez Lucio, *The Transformation of Joint Regulation and Labour Market Policy in Europe during the Crisis: Comparative Project Report* (University of Manchester/The European Commission 2014).

⁹⁷ Report of the CCAS, ILC Record of Proceedings (2012), Part I/13.

⁹⁸ Ibid., Part I/19.

⁹⁹ Henner Gött, *Interactions Between International Organizations – Approaching a Neglected Governance Dimension*, 17 International Organizations Law Review (2020), forthcoming.

¹⁰⁰ Louis n.22 above, 240 – 242. See also Francis Maupain, *The Future of the International Labour Organization in the Global Economy* (Hart 2013), 225.

¹⁰¹ Offe and Wiesenenthal n.16 above, 108.

it offered). The ITUC was however forced to face what Offe and Wiesenhal termed a fifth stage challenge to its previous commitment to political engagement.¹⁰²

Undaunted, the CEACR continued with its criticism of EU legal constraints on the right to strike, as manifested in BALPA.¹⁰³ Similarly, in response to concerns raised concerning implementation of the *Laval* case in Sweden, the CEACR recalled ‘that imposing sanctions on unions for leading a legitimate strike is a grave violation of the principles of freedom of association’. An assessment of proportionality ‘bearing in mind a notion of freedom of establishment or freedom to provide services’ also did not comply with established ILO standards.¹⁰⁴ Meanwhile, on the advice of the IOE as their secretariat, the employers’ group continued to block any approval of CEACR findings in the CAS, so that a ‘special paragraph’, the ultimate sanction of the Conference for breach of labour standards could not be issued in respect of the right to strike.¹⁰⁵

The ITUC at this stage began to mobilize, launching a lengthy legal opinion of 122 pages on *The Right to Strike and the ILO*, published on its website in March 2014, authored by the ITUC legal adviser, Jeffrey Vogt, joined by a number of academic scholars in support (myself included, alongside Ewing and Hendy).¹⁰⁶ The ITUC expressed confidence that the CEACR position would be upheld were the matter placed before the International Court of Justice (ICJ) for an advisory opinion, since if the CEACR was not competent to interpret Conventions, the ICJ could do so under Article 31 of the ILO Constitution. The IOE in a thinner briefing (of 13 pages) posted on its website in October 2014, rejected the authority of the CEACR to interpret Convention No. 87 to include a right to strike,¹⁰⁷ but also resisted

¹⁰² Ibid., 109.

¹⁰³ ILO CEACR Report (2013), 196.

¹⁰⁴ Ibid., 176-180.

¹⁰⁵ Report of the CCAS, ILC Record of Proceedings (2013), Part I/13 and Part II. Discussed in Tonia Novitz, *The Internationally Recognized Right to Strike: A Past, Present, and Future Basis upon Which to Evaluate Remedies for Unlawful Collective Action?*, 30(3) International Journal of Comparative Labour Law and Industrial Relations 357, 375 (2014).

¹⁰⁶ Jeffrey Vogt et al, *The Right to Strike and the ILO: The Legal Foundations* (April 29, 2020), https://www.ituc-csi.org/IMG/pdf/ituc_final_brief_on_the_right_to_strike.pdf. See text accompanying n.83 above.

¹⁰⁷ ITUC, *Do ILO Conventions 87 And 98 Recognise A Right To Strike?* (IOE 2014) (April 29, 2020), http://ioe-emp.org/fileadmin/ioe_documents/publications/Policy%20Areas/international_labour_standards/EN/2014-11-03_IOE_Paper_on_the_Right_to_Strike_in_Conventions_87_and_98_final_web_and_print.pdf.

reference to the ICJ.¹⁰⁸ Arguably, the confidence of the IOE of its relative power in this battle was indicated by this much briefer document and contradictory response. The stalemate situation at the ILO was then used by the IOE to seek to influence litigation on freedom of association and the right to strike in other regional and national fora.

D. Using the ILO employers' group walkout in other fora from 2013 – 2015

Three key attempts were made by the IOE to use the employers' group walkout to undermine the authority of previous CEACR jurisprudence on the right to strike. The first was made in a complaint relating to breach of Article 6 of the ESC before the European Committee of Social Rights (ECSR) in *LO and TCO v Sweden*.¹⁰⁹ The second consisted of an intervention in the *RMT* case brought against the UK heard by the ECtHR.¹¹⁰ The last was in Canadian constitutional litigation culminating in the *Saskatchewan* judgment.¹¹¹ In this way, the IOE sought cross-fertilisation of normative change between legal systems, seeking to unify them in a manner which reflected its rejection of CEACR jurisprudence. Yet, in no single instance was the IOE wholly successful. While Offe and Wiesenthal suggest that a union confederation might be particularly vulnerable at the point when external guarantees are withdrawn, such as the international recognition of the right to strike as a protected ILO standard, instead, the ETUC and ITUC were energised into presenting a strong litigious response. In so doing, these actors protected (and even arguably enhanced) the entitlement to take collective action in other regional and national systems.

In the *LO* case, the Swedish trade unions successfully pursued their complaint with the assistance of the ETUC. The ECSR refused to view the right to strike as a mere exception to economic freedoms, concluding that it was unduly restricted by the Swedish legislation implementing the *Laval* decision.¹¹² The IOE and BusinessEurope had offered 'Observations', referring to the walkout by the ILO employers' group, asking that '[g]iven the importance of this debate at international level', the ECSR 'take into account the current

¹⁰⁸ ILO, *Minutes of the Governing Body*, 322nd Session, October – November 2014, paras 58 – 59; discussed in Vogt et al (2020) n.85 above, 72.

¹⁰⁹ *Swedish Trade Union Confederation (LO) and Swedish Confederation of Professional Employees (TCO) v Sweden*, Complaint No. 85/2012, Decision on admissibility and on the merits, 3 July 2013, ('*LO and TCO v Sweden*'), para. 9.

¹¹⁰ Appn 31045/10 *The National Union of Rail, Maritime and Transport Workers (RMT) v UK*, 8 April 2014.

¹¹¹ *Saskatchewan Federation of Labour v Saskatchewan* 2015 SCC 4 ('*Saskatchewan*').

¹¹² *Ibid.*, paras 121 – 125.

discussion taking place among the ILO tripartite constituents'.¹¹³ The ETUC offered its own 'Observations', pointing to CEACR criticism of the *Laval* legislation in 2013, making reference also to the BALPA case.¹¹⁴ It did not mention the ILO employers' group walkout and neither ultimately did the ECSR. The ECSR decision made an implicit statement by simply ignoring that context, while offering an extensive review of relevant ILO standards, including mention of ILO Conventions 87 and 98 and CEACR findings.¹¹⁵

The UK Government in the *RMT v UK* case sought to resist a claim that protection of freedom of association under Article 11 of the ECHR entailed protection of secondary action (which is prohibited under British legislation). While the UK accepted that 'the right afforded under Article 11 to join a trade union normally implied the ability to strike',¹¹⁶ it was argued that this could not be derived from ILO jurisprudence, as 'the question of a right to strike was currently the cause of sharp controversy within the ILO, as part of which the status of the ILO Committee of Experts [the CEACR] had been called into question'.¹¹⁷ The IOE seemingly had no need to seek notice as a 'third party', since its views were represented by the UK Government. The ETUC did however intervene, alongside the British Trades Union Congress (TUC) which is an ITUC affiliate, arguing that ILO (and ESC) jurisprudence on the right to strike and condemnation of the UK was authoritative.¹¹⁸ The ECtHR's majority opinion did make explicit reference to the dispute at the ILO, but ostensibly denied its relevance, saying that the disagreements had 'originated with and were confined to the employer group' while government representatives continued to endorse established ILO jurisprudence.¹¹⁹ Nevertheless, that judgment found that 'negative assessments made by the relevant monitoring bodies of the ILO and European Social Charter' did not, in this instance, have sufficient 'persuasive weight' to find that the UK's legal treatment of secondary action constituted a violation of Article 11.¹²⁰ The ECtHR also declined 'to determine whether the taking of industrial action should now be accorded the status of an essential element of the Article 11 guarantee', even though it is regarded as a necessary aspect of freedom of

¹¹³ *LO v TCO v Sweden*, Observations by the IOE and BusinessEurope, 7 May 2013, para. 167.

¹¹⁴ *LO v TCO v Sweden*, Observations by the ETUC, 13 May 2013.

¹¹⁵ *LO v TCO v Sweden*, Decision reviewed at paras 54 – 63; with relevant comment at para. 110 and arguably paras 120 – 121.

¹¹⁶ *RMT v UK*, para. 62.

¹¹⁷ *Ibid.*, para. 69.

¹¹⁸ *Ibid.*, para. 71.

¹¹⁹ *Ibid.*, para. 97.

¹²⁰ *Ibid.*, para. 98.

association and the right to organise in ILO supervisory findings.¹²¹ In his separate ‘Concurring Opinion’, Judge Wojtyczek relied more directly on the actions of the employer group as a reason to resist application of ILO principles regarding a right to strike, reaching the same conclusion as the majority.¹²²

By 2013, the IOE was already seeking to intervene in Canadian proceedings, offering affidavit support of the contention that the right to strike was *not* enshrined in the ILO’s international labour standards,¹²³ and in doing so was countered energetically by the ITUC.¹²⁴ The dispute at the ILO was again cited in submissions before the Canadian Supreme Court in the *Saskatchewan* case. In response, a minority judgment delivered by Judges Rothstein and Wagner cited ‘trouble at the ILO’ as a reason to disregard CEACR and CFA jurisprudence.¹²⁵ Nevertheless, a majority of the Court in the compelling judgment delivered by Abella J found that a total strike ban on those unilaterally designated ‘essential service employees’ (without any alternative arbitration as contemplated in the ILO supervisory jurisprudence) violated the principle of freedom of association under section 2(d) of the Canadian Charter of Rights and Freedoms.¹²⁶ In so doing, Abella J’s judgment was more supportive of the right to strike than the ECtHR in *RMT*, confirming that: “The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right.”¹²⁷

The *Saskatchewan* judgment was delivered on 30 January 2015. On 18 February 2015, the ITUC organized a ‘global day of action on the right to strike’ which led to widespread protests by affiliate unions around the world.¹²⁸ This can be viewed as an attempt to demonstrate workers’ willingness to act, as Offe and Wiesenthal might have anticipated,¹²⁹ but the ITUC’s litigious mobilization may have had in fact more influence. In doing so, the

¹²¹ Ibid., paras 77 and 84. Discussed in Alan Bogg and K.D. Ewing, *The Implications of the RMT Case*, 43(3) Industrial Law Journal 221, 222 and 230 (2014).

¹²² *RMT v UK*, ‘Concurring Opinion’ of Judge Wojtyczek, para. 8.

¹²³ See Affidavit of Brent Wilton (IOE Secretary-General), *Canadian Union of Postal Workers v AG of Canada*, Ontario Superior Court of Justice, 18 March 2013.

¹²⁴ Affidavit of Sharan Burrow (ITUC Secretary-General), *Canadian Union of Postal Workers v AG of Canada*, Ontario Superior Court of Justice, 1 June 2013.

¹²⁵ *Saskatchewan per Rothstein and Wagner JJ*, paras 151–153.

¹²⁶ *Saskatchewan per Abella J*, paras 67–68.

¹²⁷ Ibid., para. 3. For comment, see Fudge, n.2.

¹²⁸ ITUC ‘Hands off our right to strike’ (April 29, 2020), https://www.ituc-csi.org/18feb?debut_news_577=5. For a view of this action from the employers’ side, see Chris Syder, ‘Global day of trade union action to defend the right to strike’ (April 29, 2020), <https://www.penningtonslaw.com/news-publications/latest-news/global-day-of-trade-union-action-to-defend-the-right-to-strike>.

¹²⁹ Offe and Wiesenthal, n.16 above, 108-109.

ITUC drew on extensive institutional and societal resources, its assets including the message of unity, expressed by engagement with affiliate unions and other allies like the ETUC.

Ultimately, on 23 February 2015, a compromise agreement was reached in the form of a ‘Joint Statement of Workers’ and Employers’ Groups’ at the ILO.¹³⁰ The Joint Statement recognised ‘the mandate of the CEACR’ as defined in the CEACR’s own report of 2015, while also acknowledging that: ‘The right to take industrial action by workers and employers in support of their legitimate industrial interests is recognised by the constituents of the International Labour Organisation.’ However, while the ‘Government Group Statement’ expressly stated ‘that the right to strike is linked to freedom of association which is a fundamental principle and right at work of the ILO’ and that ‘the complex body of recommendations and observations developed in the past 65 years of application of Convention 87 by the various components of the ILO supervisory system constitutes a valuable resource’,¹³¹ those acknowledgements are missing from the Joint Statement and were never the subject of IOE commitments.

E. The swing back (but not too far) 2016 – 2019

There does seem to have been a swing back towards protection of the right to strike as a facet of freedom of association and the right to organise, with the determined advocacy of both the ETUC and ITUC, but it has not gone too far. For example, in 2017 a European Pillar of Social Rights was adopted by the EU,¹³² which makes specific reference to collective bargaining and the right to take collective action in principle 8. However, the Commission Communication issued in January 2020 for ‘A Strong Social Europe for Just Transitions’¹³³ mentioned only social dialogue and collective bargaining, not collective action or a right to strike.

¹³⁰ See, ILO, Tripartite Meeting on the Freedom of Association and Protection of the Right to Organise Convention, Outcome of the Meeting, 23 – 25 February 2015, Annex I (April 29, 2020), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_346764.pdf.

¹³¹ Ibid., Annex II, paras 4 and 6.

¹³² Interinstitutional Proclamation on the European Pillar of Social Rights 2017/C 428/09, 13.12.2017 (April 29, 2020), [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017C1213\(01\)&from=EN](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32017C1213(01)&from=EN).

¹³³ COM(2020)14 final. See also on consultation regarding regulation of a minimum wage challenging the exclusion in Article 153(5) TFEU (April 29, 2020), https://ec.europa.eu/commission/presscorner/detail/en/qanda_20_20.

Following the *RMT* judgment, ECtHR case law has been inconsistent. The judgment in *Association of Academics v Iceland*¹³⁴ made no mention of ILO standards, but repeated the finding in *RMT* that a right to strike may be protected under Article 11 but is not an essential element of freedom of association.¹³⁵ By way of contrast, the majority judgment¹³⁶ in *Ognevenko v Russia*¹³⁷ is notable for its assertion that the right to strike is ‘one of the most important means’ by which trade unions and their members could defend their interests under Article 11.¹³⁸ That judgment referred extensively to both CEACR and CFA findings.¹³⁹ Notably, these were both public sector cases in which the IOE was not directly interested.

At the ILO, despite opposition from the IOE, a new edition of CFA findings was issued as a ‘Compilation’ of Decisions in 2018. There was however a change in title from the past ‘Digest’ of Decisions, although the format remains largely the same.¹⁴⁰ The IOE continue to insist that the right to strike has never been ‘regulated at the supranational or global level’, including by ILO Conventions Nos 87 and 98.¹⁴¹ While the employers’ group constitute a minority in the ILC and ILO Governing Body, their adamant opposition on this issue has been curiously persuasive in extracting concessions. The ILO International Labour Conference in the 2019 Centenary Declaration¹⁴² and even the International Labour Office report on Sustainable Development Goal 8¹⁴³ are notably silent on the subject of a right to strike. By way of comparison, the ITUC offers no countervailing threat and perhaps would not want to undermine the leadership of the current Director-General. This dynamic seems to

¹³⁴ Appn no 2451/16, *Association of Academics v Iceland*, 15 May 2018.

¹³⁵ See *RMT*, above, at para. 77; cited in *Association of Academics*, at para. 24.

¹³⁶ The Russian Judge Dedov provided the sole Dissenting Opinion (in his country’s own cause).

¹³⁷ Appn no 44873/09, *Ognevenko v Russia*, 20 November 2018. See Tonia Novitz, *To Protect the Right to Strike or Not? The Question Before the European Court of Human Rights in app no 2451/16 Association of Academics v Iceland and app no 44873/09 Ognevenko v Russia*, *Comparative Labour Law and Policy Journal*, Dispatch No. 15 (2019).

¹³⁸ *Ognevenko v Russia*, paras 56 – 57.

¹³⁹ *Ibid.*, para. 22.

¹⁴⁰ Vogt n.85, 63 and 188.

¹⁴¹ Hornung-Draus n.26, 5 (2020).

¹⁴² ‘ILO Centenary Declaration for the Future of Work, 2019’ (April 29, 2020), <https://www.ilo.org/global/about-the-ilo/mission-and-objectives/centenary-declaration/lang-en/index.htm>.

¹⁴³ ILO International Labour Office, *Time to Act for SDG 8: Integrating decent work, sustained growth and environmental integrity* (ILO, 2019).

continue in the re-examination of ILO standards and supervisory mechanisms through the ‘Standards Review Mechanism’.¹⁴⁴

Greater support for a right to strike has been forthcoming instead from the UN human rights system, due to the 2018 report of the UN Special Rapporteur on Freedom of Assembly and Freedom of Association¹⁴⁵ and the Joint Statement of the UN Human Rights Committee and Committee on Economic, Social and Cultural Rights. The latter says that the right to strike is ‘corollary to the effective exercise of the right to form and join trade unions’.¹⁴⁶ The ITUC has won the argument in that sphere, even if tripartism makes a palpable victory less likely at the ILO.

IV. CONCLUSION

The tale told in this article might just seem like a clash of systems or another story of fragmentation. ILO norms have been put to use differently in different systems (the EU being separate from the Council of Europe). An autopoietic analysis would prompt us to identify the communicative processes by which cross-fertilisation or disruption has been achieved and perhaps suggest procedural solutions. This ‘neutral’ approach may however be deceptive.¹⁴⁷ It has been argued in this article that important roles are played in these settings by transnational representatives of employers and workers, especially the IOE and ITUC, and that the relative power of these agents may be significant.

Some of the ways in which the IOE and ITUC have sought to exercise political influence are reminiscent of observations once offered by Offe and Wiesenenthal regarding the dynamics of interactions between national employer and worker associations.¹⁴⁸ Rejection by the IOE of established ILO norms and pursuit of litigation in a variety of other spheres citing that rejection, accords with predictions made by Offe and Wiesenenthal that employers’

¹⁴⁴ As discussed in Claire La Hovary, *The ILO’s Employers’ Group and the Right to Strike*, 22(3) *Transfer: European Review of Labour and Research* 401, 404 (2016); Paul van der Heijden, *The ILO Stumbling towards Its Centenary Anniversary*, 15(1) *International Organizations Law Review* 203, 219 (2018).

¹⁴⁵ Report of the Special Rapporteur on the rights to freedom of peaceful assembly and association, 7 August 2018, A/73/279, paras 6 and 58.

¹⁴⁶ ‘Freedom of Association, Including the Right to Form and Join Trade Unions’, Joint statement by the Committee on Economic, Social and Cultural Rights and the Human Rights Committee, 23 October 2019, E/C.12/2019/3-CCPR/C/2019/1.

¹⁴⁷ Offe and Wiesenenthal, n.16 above, 71 and 94.

¹⁴⁸ See text accompanying ns 42 - 62 above.

associations, when they have the opportunity, are likely to disrupt the expectations of workers' associations which have become overly dependent on external guarantees given by political institutions.¹⁴⁹ Their model assumed that this challenge by employers would come from a place of strength, and that analysis accords with the increase in employer power at the end of the Cold War and in a time of austerity. Another reading, less consistent with their hypothesis is that the IOE was acting out a sense of vulnerability and a need to utilise its ILO influence to persuade business of its relevance and viability, perceiving itself in competition with other forms of business representation on the global scale and alarmed that the ILO might be vulnerable to increasing ITUC influence. Indeed, the IOE's difficulties may be continuing, since the Confederation of British Industry, whose representative Chris Syder was the chief proponent of the 2012 employers' group walkout, is no longer a member of the IOE.¹⁵⁰

Whether acting out of strength or vulnerability, the IOE placed the ITUC in a position where had to respond, namely in a fifth stage of crisis in political engagement that Offe and Wiesenenthal had anticipated. The ITUC did, as they suggested it should, seek to demonstrate its members' willingness to act through a rare global day of action in 2015. However, this was a one-off event and it seems to have been the ITUC's ongoing response to the litigious claims of the IOE, by fully deploying its institutional and societal resources in alliances (unity) with the ETUC, GUFs and its national union members, that was its most effective form of collective mobilization. Moreover, it seems that the ITUC appreciates the need for external guarantees beyond the ILO, where they are forthcoming in other systems, such as the UN and Council of Europe human rights systems and even within the EU.

Arguably, the challenge the IOE faces has also highlighted the need to strengthen its membership bases and alliances so as to be able to mobilise effectively. A restrictive approach to freedom of association only for narrowly defined workers,¹⁵¹ would limit the ITUC's ability to act and thereby exercise future influence. In this respect, the ITUC campaign for an extended 'Universal Labour Guarantee' as a facet of decent work and

¹⁴⁹ See Offe and Wiesenenthal, n.16 above, 108.

¹⁵⁰ See IOE 'Members' (March 22, 2020), <https://www.ioe-emp.org/en/members-regions/>.

¹⁵¹ See Valerio De Stefano, *Non-Standard Work and Limits on Freedom of Association: A Human Rights-Based Approach*, 46(2) Industrial Law Journal 185 (2017). Reflected in a wider community-based lobby, for example see 'Clean Slate for Worker Power: Building a Just Economy and Democracy' (April 29, 2020), <https://www.cleanslateworkerpower.org/>.

sustainable development is likely to be important for its strategic aims.¹⁵² The ITUC may also need to assert its interests in a wider range of issues which also overlap with that of other UN agencies, such as the World Health Organization, in the context of the impact of the coronavirus crisis on worker health.¹⁵³ In these ways, an awakening to the potential limitations of ILO processes may not lead to the fragility anticipated by Offe and Wiesenenthal, even if the ITUC cannot readily demonstrate the willingness to act of the workers who are the members of its affiliates. Rather, in contemporary global politics, the ITUC may yet utilise other resources to greater effect.

¹⁵² ITUC, 'ITUC takes demand for a New Social Contract to the UN General Assembly' (April 29, 2020), <https://www.ituc-csi.org/ituc-takes-demand-for-a-new-social>. See also for extended discussion of the Universal Labour Guarantee and its relationship to sustainable development, Tonia Novitz, *Engagement with Sustainability at the International Labour Organization and Wider Implications for Collective Worker Voice* 159(4) *International Labour Review*, forthcoming (2020).

¹⁵³ 'ITUC May 1st Statement - One World: Jobs, Incomes, Social Protection' (April 29, 2020), <https://www.ituc-csi.org/ituc-may-1st-statement-one-world>.